

**REDACTED DECISION – DOCKET NUMBER 13-337 MFE - By A.M. “FENWAY”
POLLACK, CHIEF ADMINISTRATIVE LAW JUDGE– SUBMITTED for DECISION on
DECEMBER 19, 2013 – DECISION ISSUED on JUNE 17, 2014**

SYNOPSIS

TAXATION

SUPERVISION

GENERAL DUTIES AND POWERS OF COMMISSIONER; APPRAISERS

It is the duty of the Tax Commissioner to see that the laws concerning the assessment and collection of all taxes and levies are faithfully enforced. *See* W. Va. Code Ann. §11-1-2 (West 2010).

TAXATION

WEST VIRGINIA TAX PROCEDURE AND ADMINISTRATION ACT

COLLECTION OF TAX

“The Tax Commissioner shall collect the taxes, additions to tax, penalties and interest imposed by this article or any of the other articles of this chapter to which this article is applicable.” W. Va. Code Ann. §11-10-11(a) (West 2010).

TAXATION

MOTOR FUEL EXCISE TAX

**SHIPPING DOCUMENTS; TRANSPORTATION OF MOTOR FUEL BY
BARGE, WATERCRAFT, RAILROAD TANK CAR OR TRANSPORT TRUCK;
CIVIL PENALTY**

“A person shall not transport in this state any motor fuel by barge, watercraft, railroad tank car or transport vehicle unless the person has a machine-generated shipping document, including applicable multiple copies thereof, for the motor fuel that complies with this section . . .” W. Va. Code Ann. §11-14C-34(a) (West 2010).

TAXATION

MOTOR FUEL EXCISE TAX

DEFINITIONS

“Motor fuel” means gasoline, blended fuel, aviation fuel and any special fuel.” W. Va. Code Ann. §11-14C-2(57) (West 2010).

TAXATION

MOTOR FUEL EXCISE TAX

DEFINITIONS

“Special fuel” means any gas or liquid, other than gasoline, used or suitable for use as motor fuel in an internal combustion engine or motor to propel any form of vehicle, machine, or mechanical contrivance and includes products commonly known as natural or casing-head gasoline, diesel fuel, dyed diesel fuel, biodiesel fuel, transmix and all forms of motor fuel

commonly or commercially known or sold as butane, propane, liquefied natural gas, liquefied petroleum gas, compressed natural gas product or a combination of liquefied petroleum gas and a compressed natural gas product. "Special fuel" does not include any petroleum product or chemical compound such as alcohol, industrial solvent, heavy furnace oil or lubricant, unless blended in or sold for use as motor fuel in an internal combustion engine. W. Va. Code Ann. §11-14-C-2(72) (West 2010).

WEST VIRGINIA OFFICE OF TAX APPEALS

CONCLUSION OF LAW

Propane does not need to be used exclusively in an internal combustion engine in order to be considered special fuel.

TAXATION

MOTOR FUEL EXCISE TAX

SHIPPING DOCUMENTS; TRANSPORTATION OF MOTOR FUEL BY BARGE, WATERCRAFT, RAILROAD TANK CAR OR TRANSPORT TRUCK; CIVIL PENALTY

"The shipping document issued by the terminal operator or operator of a bulk plant shall contain the following information . . . (4) Destination state of the motor fuel as represented by the purchaser of the motor fuel or the purchaser's agent" W. Va. Code Ann. §11-14C-34(b)(4) (West 2010).

TAXATION

MOTOR FUEL EXCISE TAX

SHIPPING DOCUMENTS; TRANSPORTATION OF MOTOR FUEL BY BARGE, WATERCRAFT, RAILROAD TANK CAR OR TRANSPORT TRUCK; CIVIL PENALTY

A person to whom a shipping document was issued shall . . . (3) Deliver motor fuel to the destination state printed on the shipping document unless the person: (A) Notifies the commissioner before transporting the motor fuel into a state other than the printed destination state that the person has received instructions after the shipping document was issued to deliver the motor fuel to a different destination state; (B) Receives from the commissioner a confirmation number authorizing the diversion W. Va. Code Ann. §11-14C-34(d) (West 2010).

TAXATION

MOTOR FUEL EXCISE TAX

SHIPPING DOCUMENTS; TRANSPORTATION OF MOTOR FUEL BY BARGE, WATERCRAFT, RAILROAD TANK CAR OR TRANSPORT TRUCK; CIVIL PENALTY

Any person who transports motor fuel in a barge, watercraft, railroad tank car or transport vehicle without a shipping document or with a false or an incomplete shipping document, or delivers motor fuel to a destination state other than the destination state shown on the shipping document, is subject to the following civil penalty . . . (3) The amount of the civil penalty for a first violation is five thousand dollars . . . (4) The amount of the civil penalty for

each subsequent violation is ten thousand dollars. W. Va. Code Ann. §11-14C-34(f) (West 2010).

TAXATION

WEST VIRGINIA OFFICE OF TAX APPEALS

HEARING PROCEDURES

In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, the burden of proof is upon the Petitioner to show that any assessment of tax against it is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code Ann. §11-10A-10(e) (West 2010); W. Va. Code R. §§121-1-63.1 and 69.2 (2003).

WEST VIRGINIA OFFICE OF TAX APPEALS

CONCLUSION OF LAW

The Petitioner in this matter has not carried its burden of proving that the July 5, 2013, assessment issued against it was erroneous, unlawful, void or otherwise invalid.

FINAL DECISION

On July 5, 2013, the Compliance Division of the West Virginia State Tax Commissioner's Office (Tax Commissioner or Respondent) issued an Assessment against the Petitioner. This assessment was issued pursuant to the authority of the State Tax Commissioner, granted to him by the provisions of Chapter 11, Article 10 *et seq.*, of the West Virginia Code. The assessment was in the amount of \$_____ and was based upon three violations of West Virginia Code Section 11-14C-34. Thereafter, on September 3, 2013, the Petitioner timely filed with this Tribunal, a petition for reassessment. An evidentiary hearing was held in this matter on December 11, 2013. Thereafter, on December 19, 2013, the Petitioner indicated that it did not desire the opportunity to file a legal brief and the matter became ripe for a decision.

FINDINGS OF FACT

1. The Petitioner is an out-of-state limited liability company, with its principal place of business being in that State.

2. On three occasions, July 20, 21, and 23, 2012, the Petitioner was conducting interstate transportation of propane and diverted that propane to a location in a County in West Virginia.

3. During each of the three July deliveries, the Petitioner failed to notify the West Virginia Tax Commissioner that the propane had been diverted from the destination state shown on the relevant shipping documents.¹

4. The propane that was delivered to the County in West Virginia was used for home heating.

5. Upon discovery of the diversion and failure to notify the Tax Commissioner, a Tax Department employee issued three money penalty assessments, one for each violation. The first was in the amount of \$_____ and the next two were each in the amount of \$_____, for a total money penalty of \$_____. This total money penalty is what led to the single July 5, 2013 assessment that forms the basis of this appeal.

DISCUSSION

The law that controls this matter is basically clear and unambiguous. First, “A person shall not transport in this state any motor fuel by barge, watercraft, railroad tank car or transport vehicle unless the person has a machine-generated shipping document, including applicable multiple copies thereof, for the motor fuel that complies with this section” W. Va. Code Ann. §11-14C-34(a) (West 2010). One of the things the machine-generated shipping documents must show is the destination state of the motor fuel. *See* W. Va. Code Ann. §11-14C-34(b)(4) (West 2010). If the motor fuel is delivered to a state different than the destination on the

¹ The record is unclear as to what was listed as the original destination state.

shipping documents, the carrier must notify the Tax Commissioner and obtain what is commonly called a diversion number.²

The Petitioner does not dispute that on the three dates in question it delivered propane to a location in a County in West Virginia, when the shipping documents for that propane showed a planned destination outside of West Virginia. The Petitioner also does not deny that it failed to obtain a diversion number on the dates of the three deliveries in question. Nor does the Petitioner complain that the Tax Commissioner has incorrectly calculated the amount of the money penalty. The Petitioner's entire defense to these money penalties is its reliance on a 2006 decision from this Tribunal in which we ruled that propane is not a motor fuel, unless it is used in an internal combustion engine.

In Docket No. 06-271, this Tribunal was also faced with a Petitioner who delivered propane. The decision relied on the definition of special fuel, which states:

“Special fuel” means any gas or liquid, other than gasoline, used or suitable for use as motor fuel in an internal combustion engine or motor to propel any form of vehicle, machine, or mechanical contrivance and includes products commonly known as natural or casing-head gasoline, diesel fuel, dyed diesel fuel, biodiesel fuel, transmix and all forms of motor fuel commonly or commercially known or sold as butane, propane, liquefied natural gas, liquefied petroleum gas, compressed natural gas product or a combination of liquefied petroleum gas and a compressed natural gas product. “Special fuel” does not include any petroleum product or chemical compound such as alcohol, industrial solvent, heavy furnace oil or lubricant, unless blended in or sold for use as motor fuel in an internal combustion engine.

W. Va. Code Ann. §11-14-C-2(72) (West 2010)

² (d) A person to whom a shipping document was issued shall . . . (3) Deliver motor fuel to the destination state printed on the shipping document unless the person: (A) Notifies the commissioner before transporting the motor fuel into a state other than the printed destination state that the person has received instructions after the shipping document was issued to deliver the motor fuel to a different destination state; (B) Receives from the commissioner a confirmation number authorizing the diversion W. Va. Code Ann. §11-14C-34(d) (West 2010).

The decision in Docket No. 06-271 relied on the last sentence of the definition as standing for the proposition that in order to be special fuel, propane must be used in an internal combustion engine.

By this decision we expressly overrule the decision in Docket No. 06-271. To read the definition of special fuel as the Petitioner seeks would create an absurd result. The definition of special fuel includes any gas or liquid used in **any mechanical contrivance** and expressly includes propane. The propane at issue in this matter was used for home heating. Obviously, no matter what type of home heating system was involved, they were all “mechanical contrivance[s]” as that term is used in West Virginia Code Section 11-14C-2(72). Clearly, it would create an absurd result to read the first portion of Subsection 2(72) as defining the propane that is used in home heating systems as special fuel, only to nullify that definition in the very next sentence, by stating that propane must be used exclusively in internal combustion engines in order to be considered special fuel. The last sentence of Subsection 2(72) was clearly discussing another entire category of special fuels, “such as alcohol, industrial solvent, heavy furnace oil or lubricant, unless blended in or sold for use as motor fuel in an internal combustion engine. *See* W. Va. Code Ann. §11-14-C-2(72) (West 2010)

A reading such as the Petitioner seeks would not only create an absurd result, it would rewrite the first sentence in Subsection 2(72) to make most of it a nullity. Both results are something the West Virginia Supreme Court of Appeals has cautioned against on numerous occasions. *See e.g. Dunlap v. Friedman's, Inc.*, 213 W.Va. 394, 582 S.E.2d 841 (W.Va. 2003)

CONCLUSIONS OF LAW

1. It is the duty of the Tax Commissioner to see that the laws concerning the assessment and collection of all taxes and levies are faithfully enforced. *See* W. Va. Code Ann. §11-1-2 (West 2010).

2. “The Tax Commissioner shall collect the taxes, additions to tax, penalties and interest imposed by this article or any of the other articles of this chapter to which this article is applicable.” W. Va. Code Ann. §11-10-11(a) (West 2010).

3. “A person shall not transport in this state any motor fuel by barge, watercraft, railroad tank car or transport vehicle unless the person has a machine-generated shipping document, including applicable multiple copies thereof, for the motor fuel that complies with this section” W. Va. Code Ann. §11-14C-34(a) (West 2010).

4. “Motor fuel” means gasoline, blended fuel, aviation fuel and any special fuel” W. Va. Code Ann. §11-14C-2(57) (West 2010).

5. “Special fuel” means any gas or liquid, other than gasoline, used or suitable for use as motor fuel in an internal combustion engine or motor to propel any form of vehicle, machine, or mechanical contrivance and includes products commonly known as natural or casing-head gasoline, diesel fuel, dyed diesel fuel, biodiesel fuel, transmix and all forms of motor fuel commonly or commercially known or sold as butane, propane, liquefied natural gas, liquefied petroleum gas, compressed natural gas product or a combination of liquefied petroleum gas and a compressed natural gas product. “Special fuel” does not include any petroleum product or chemical compound such as alcohol, industrial solvent, heavy furnace oil or lubricant, unless blended in or sold for use as motor fuel in an internal combustion engine. W. Va. Code Ann. §11-14-C-2(72) (West 2010)

6. Propane does not need to be used exclusively in an internal combustion engine in order to be considered special fuel.

7. “The shipping document issued by the terminal operator or operator of a bulk plant shall contain the following information . . . (4) Destination state of the motor fuel as

represented by the purchaser of the motor fuel or the purchaser's agent”W. Va. Code Ann. § 11-14C-34(b)(4) (West 2010).

8. A person to whom a shipping document was issued shall . . . (3) Deliver motor fuel to the destination state printed on the shipping document unless the person: (A) Notifies the commissioner before transporting the motor fuel into a state other than the printed destination state that the person has received instructions after the shipping document was issued to deliver the motor fuel to a different destination state; (B) Receives from the commissioner a confirmation number authorizing the diversion W. Va. Code Ann. § 11-14C-34(d) (West 2010).

9. Any person who transports motor fuel in a barge, watercraft, railroad tank car or transport vehicle without a shipping document or with a false or an incomplete shipping document, or delivers motor fuel to a destination state other than the destination state shown on the shipping document, is subject to the following civil penalty . . . (3) The amount of the civil penalty for a first violation is five thousand dollars . . . (4) The amount of the civil penalty for each subsequent violation is ten thousand dollars. W. Va. Code Ann. § 11-14C-34(f) (West 2010).

10. In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, the burden of proof is upon the Petitioner to show that any assessment of tax against it is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code Ann. § 11-10A-10(e) (West 2010); W. Va. Code R. §§ 121-1-63.1 and 69.2 (2003).

11. The Petitioner in this matter has not carried its burden of proving that the July 5, 2013, assessment issued against it was erroneous, unlawful, void or otherwise invalid.

DISPOSITION

Based upon the above, it is the **FINAL DECISION** of the West Virginia Office of Tax Appeals that the assessment issued against the Petitioner on July 5, 2013, in the amount of \$_____, is hereby **AFFIRMED**.

WEST VIRGINIA OFFICE OF TAX APPEALS

By: _____
A. M. "Fenway" Pollack
Chief Administrative Law Judge

Date Entered